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In The
Supreme Court of the United States

ADARAND CONSTRUCTORS, INC.,
Petitioner,

v.

NORMAN Y. MINETA, Secretary of the United States Department of Transportation, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF WOMEN FIRST NATIONAL LEGISLATIVE COMMITTEE, ET AL., *AMICI CURIAE* IN SUPPORT OF AFFIRMANCE OF THE TENTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

1. Whether the Court of Appeals misapplied the strict scrutiny standard in determining if Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination.

2. Whether the United States Department of Transportation's current Disadvantaged Business Enterprise program is narrowly tailored to serve a compelling governmental interest.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES.....v

INTEREST OF AMICI CURIAE.....1

SUMMARY OF THE ARGUMENT.....3

ARGUMENT.....5

I. IN ORDER TO PREVAIL, PETITIONER MUST ESTABLISH THAT THE STATUTES AND REGULATIONS CANNOT BE APPLIED IN A CONSTITUTIONAL MANNER UNDER ANY SET OF CIRCUMSTANCES.....5

II. CONGRESS AND DOT HAD A STRONG BASIS IN EVIDENCE FOR CONCLUDING THAT RACE AND GENDER DISCRIMINATION HAVE HARMED MINORITY- AND WOMEN-OWNED FIRMS IN TRANSPORTATION-RELATED GOVERNMENT CONTRACTING.....6

III. THE NARROW TAILORING ANALYSIS EXAMINES SEVERAL FACTORS. IT IS NOT A SINGLE, RIGID TEST.....8

IV. CONGRESS ADOPTED THE CURRENT PROGRAM ONLY AFTER CONSIDERING RACE- AND GENDER-NEUTRAL ALTERNATIVES.....10

V. THE PROCESS OF DETERMINING ELIGIBILITY FOR THE SDB AND DBE PROGRAMS IS NARROWLY TAILORED.....12

A. The Presumption is Rebuttable.....12

B. Program Eligibility Is Limited To Persons Who Are Economically Disadvantaged.....15

C. The Different Treatment Resulting From The Presumption Is Limited To The Burden Of Proof Placed On Applicants; All Applicants Are Subjected To An Individualized Inquiry.....15

D. The Presumption Applies to Groups Found By Congress To Have Been Harmed By Discrimination.....17

VI. DOT REQUIRES THE USE OF RACE- AND GENDER-NEUTRAL ALTERNATIVES BEFORE RACE OR GENDER-CONSCIOUS REMEDIES CAN BE IMPLEMENTED.....18

VII. THE PROGRAMS LAST NO LONGER THAN NECESSARY.....19

VIII. THE ASPIRATIONAL GOALS ARE NARROWLY TAILORED.....20

IX. THE PROVISIONS GOVERNING THE GEOGRAPHICAL SCOPE OF THE PROGRAMS ARE NARROWLY TAILORED.....23

X. PETITIONER HAS NOT CHALLENGED THE GENDER-BASED CLASSIFICATION

IN THE STATUTES OR REGULATIONS WHICH, IN ANY EVENT, SATISFY BOTH STRICT AND INTERMEDIATE SCRUTINY. 26

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Adarand Constructors, Inc. v. Mineta,
121 S. Ct. 1598 (2001) 3

Adarand Constructors, Inc. v. Pena,
515 U.S. 200 (1995) ..... *passim*

Adarand Constructors, Inc. v. Slater,
228 F.3d 1147 (10th Cir. 2001) 2, 25, 26

Alaska Airlines, Inc. v. Brock,
480 U.S. 678 (1987) 27

Board of Trustees of the State University of New York v. Fox,
492 U.S. 469 (1989) 9

Brockett v. Spokane Arcades, Inc.,
472 U.S. 491 (1985) 27

Buckley v. Valeo,
424 U.S. 1 (1976) 27

Bush v. Vera,
517 U.S. 952 (1996) 9

Califano v. Goldberg,
430 U.S. 199 (1977) 29

Califano v. Webster,
430 U.S. 313 (1977) 29

Champlin Refining Co. v. Corporation Commission of Oklahoma,
286 U.S. 210 (1932) 27

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) 13

City of Richmond v. J.A. Croson Co.
488 U.S. 469 (1989) ..... *passim*

Fullilove v. Klutznick,
448 U.S. 448 (1980) ..... *passim*

Mississippi University for Women v. Hogan,
458 U.S. 718 (1982) 29

Nguyen v. INS,
121 S. Ct. 2053 (2001) 9, 28

Roberts v. United States Jaycees,
468 U.S. 609 (1984) 28

Rust v. Sullivan,
500 U.S. 173 (1991) 5, 6

Texas Department of Community Affairs v. Burdine,
450 U.S. 248 (1981) 17

Turner Broadcasting System, Inc. v. FCC,
520 U.S. 180 (1997) 8

United States v. Mead Corp.,
121 S. Ct. 2164 (2001) 13

United States v. Salerno,
481 U.S. 739 (1987) 6

United States v. Paradise,
480 U.S. 149 (1987) 9, 11

United States v. Virginia,
518 U.S. 515 (1996) 10, 28

Wygant v. Jackson Board of Education,
476 U.S. 267 (1986) 6, 9, 25

STATUTES

13 C.F.R. Part 121 (2000) 15
13 C.F.R. Part 124 (2000) 3, 12
13 C.F.R. § 124.103 (2000) 2, 13, 16, 18
13 C.F.R. § 124.1002 (2000) 13, 15
13 C.F.R. § 124.1008 (2000) ..... *passim*
13 C.F.R. § 124.1011 (2000) 16
13 C.F.R. § 124.1014 (2000) 20
13 C.F.R. § 124.1016 (2000) 14, 20
13 C.F.R. § 124.1017 (2000) 14

48 C.F.R. Part 19 (2000) 1, 3
48 C.F.R. § 19.001 (2000) 12
48 C.F.R. § 19.703 (2000) 14
48 C.F.R. § 19.705-4 (2000) 20
48 C.F.R. § 19.705-7 (2000) 2
48 C.F.R. § 19.1101 (2000) 2

48 C.F.R. § 19.1201 (2000) 2
48 C.F.R. § 19.1203 (2000) 2

49 C.F.R. Part 26 (2000) ..... *passim*
49 C.F.R. § 26.29 (2000) 19
49 C.F.R. § 26.41 (2000) 20, 21
49 C.F.R. § 26.43 (2000) 21
49 C.F.R. § 26.45 (2000) ..... *passim*
49 C.F.R. § 26.51 (2000) 18, 19, 23, 25
49 C.F.R. § 26.65 (2000) 15
49 C.F.R. § 26.67 (2000) ..... *passim*
49 C.F.R. § 26.73 (2000) 16
49 C.F.R. § 26.83 (2000) 16, 20
49 C.F.R. § 26.87 (2000) 14

15 U.S.C. § 631 (2000) 29
15 U.S.C. § 637 (2000) 2, 12, 18
15 U.S.C. § 644 (2000) 21
15 U.S.C. § 645 (2000) 16

18 U.S.C. § 1001 (2000) 16

31 U.S.C. § 3729 (2000) 16

Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1919 26

Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 132 26

Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107 (1998). 19, 21, 26, 27

LEGISLATIVE HISTORY

134 Cong. Rec. 27816 (Oct. 3, 1988) 8, 27, 28, 29
134 Cong. Rec. 27817 (Oct. 3, 1988) 8, 27, 28, 29
134 Cong. Rec. 27818 (Oct. 3, 1988) 8, 27, 28, 29
134 Cong. Rec. 27819 (Oct. 3, 1988) 8, 27, 28, 29
134 Cong. Rec. 27820 (Oct. 3, 1988) 8, 27, 28, 29
134 Cong. Rec. 27821 (Oct. 3, 1988) 8, 27, 28, 29

144 Cong. Rec. H3960 (May 22, 1998) 13
144 Cong. Rec. H3958 (May 22, 1998) 6
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144 Cong. Rec. S1401 (Mar. 5, 1998) 11
144 Cong. Rec. S1402 (Mar. 5, 1998) 13
144 Cong. Rec. S1403 (Mar. 5, 1998) 11
144 Cong. Rec. S1404 (Mar. 5, 1998) 11
144 Cong. Rec. S1409 (Mar. 5, 1998) 7, 11
144 Cong. Rec. S1420 (Mar. 5, 1998) 11
144 Cong. Rec. S1421 (Mar. 5, 1998) 11
144 Cong. Rec. S1425 (Mar. 5, 1998) 11
144 Cong. Rec. S1426 (Mar. 5, 1998) 11
144 Cong. Rec. S1490 (Mar. 6, 1998) 7

61 Fed. Reg. 26042 (May 23, 1996) ..... *passim*
63 Fed. Reg. 35713 (June 30, 1998) 23, 24, 25
64 Fed. Reg. 5096 (Feb. 2, 1999) 13, 15, 22
64 Fed. Reg. 52806 (Sept. 30, 1999) 20, 24, 25

H.R. Rep. 100-736 (1988) 7, 8, 27, 29
H.R. Rep. 100-955 (1988) 7, 28

S. Rep. No. 100-4 (1987)..... 7

ISTEA's Race Based Set Asides After Adarand: Hearing Before the Subcomm. on the Constitution, Federalism, and Prop. Rights of the Senate Comm. on the Judiciary, 105th Cong. 117-23 (1997) 7

New Economic Realities: The Role of Women Entrepreneurs, Hearing Before the House Comm. on Small Bus., 100th Cong. 3-158 (1988) 7, 27, 28

GAO, Report to Congressional Committees: Disadvantaged Business Enterprises, Critical Information is Needed to Understand Program Impact (June 2001)..... 8

OTHER AUTHORITY

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INTEREST OF AMICI CURIAE

This brief is respectfully submitted on behalf of Women First National Legislative Committee, the Illinois Association of Women Contractors and Entrepreneurs, the Federation of Women Contractors, the National Women's Law Center, and the National Partnership for Women and Families ("Women Amici") as amici curiae.[1]

The Women Amici include organizations which represent small businesses owned by women of different races that operate and compete within the transportation-related (including airport, highway, and transit) construction industry. These businesses have been certified as Disadvantaged Business Enterprises under the federal grant program administered by the United States Department of Transportation ("DOT"). 49 C.F.R. Part 26 (2000). They have experienced firsthand the detrimental effects of the discriminatory practices which, to this day, continue to plague the construction industry. As a result of this discrimination, the ability of women-owned businesses to compete for government contracts in the transportation-related area has been severely hampered. Consequently, these firms have a strong interest in affirming the constitutionality of the statutory and regulatory regimes currently under review.[2]

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[1] Additional information concerning these amici is provided in the appendix. Counsel for the Women Amici were the sole authors of this brief. No person or entity other than the Women Amici made a financial contribution to this brief. Pursuant to Supreme Court Rule 37.2(3)(a), all parties have consented to the submission of this brief. These consents have been filed concurrently herewith.

[2] The Women Amici note that there is some uncertainty over which aspects of DOT's affirmative action programs are properly before this Court. Currently, DOT has two principal programs for assisting disadvantaged businesses: (1) the Small Disadvantaged Business or "SDB" program, which operates in connection with direct federal contracting; and (2) the Disadvantaged Business Enterprise or "DBE" program, which provides federal grants to state and local governments for use in their contracting activities. *Compare* 48 C.F.R. Part 19 (2000) *with* 49 C.F.R. Part 26 (2000).

The Women Amici also include non-profit, legal advocacy organizations dedicated to the protection and advancement of women's rights and the corresponding elimination of gender and other forms of discrimination from all facets of American life. These organizations have an equally strong interest in affirming the constitutionality of the statutes and regulations under review. For decades, they have concentrated their efforts on promoting equal opportunity for women in a variety of important areas, including family, employment, education, economic security, and healthcare. They have participated as counsel and

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While women are presumptively eligible to participate in the DBE program, they are not presumptively eligible to participate in the SDB program. *Compare* 49 C.F.R. § 26.67(a) (2000) *with* 13 C.F.R. § 124.1008(e) (2000) (incorporating 13 C.F.R. § 124.103 (2000)). Thus, any discussion of both race- and gender-conscious measures in this brief refers to the DBE program only.

Furthermore, Petitioner originally challenged only the race-conscious provision of one particular provision of the SDB program—specifically, the use of a Subcontractor Compensation Clause ("SCC") by a division of DOT. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 205-06 (1995) ("*Adarand I*"). DOT has since discontinued the use of this particular clause, *see* Lodging of Women Amici ("Lodging") at 13 (filed concurrently herewith), and Petitioner has not presented any evidence or provided any argument that this clause will ever be reinstated. *See* Pet.'s Br. (*passim*). Instead, Petitioner has attempted to broaden its challenge before this Court, recasting it as a general attack on the entire SDB program. *See* Pet.'s Br. at 12-17 & nn.9-11. This program consists of a number of contractual clauses authorized by statute and DOT regulations. *See* 15 U.S.C. § 637(d)(4)-(6); *see also* 48 C.F.R. § 19.705-7 *et seq.* (2000) (liquidated damages); 48 C.F.R. § 19.1101 *et seq.* (2000) (price evaluation adjustments); 48 C.F.R. § 19.1201 *et seq.* (2000) (evaluation factors); 48 C.F.R. § 19.1203 (2000) (monetary incentives). The Tenth Circuit, however, found that Petitioner only had standing to challenge the use of the SCC and related provisions, which were the subject of the original complaint. *See Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1160 (10th Cir. 2000) ("*Adarand III*").

For this reason, the Women Amici respectfully request that the Court limit its review to only the SCC and related provisions. However, in the event that the Court is inclined to consider the merits of Petitioner's other arguments, the Women Amici have briefed these issues for consideration. *See* Sections VIII - IX *infra*.

appeared as amici curiae in numerous cases before this Court and the Circuit Courts of Appeal.

Although the Women Amici believe that all of the relevant provisions of these statutes and regulations satisfy both strict scrutiny, which applies to race-conscious programs, as well as intermediate scrutiny, which applies to gender-based classifications, we nevertheless note that Petitioner's original complaint concerned only the use of one particular race-conscious measure which is no longer employed by DOT as part of its affirmative action efforts in direct federal contracting. Indeed, Petitioner has never directly challenged the gender-conscious measures of any federal statute or regulation in this case. Thus, if the Court discerns a constitutional defect in any of the race-conscious aspects of the statutes or regulations currently under review, the Women Amici respectfully request that the Court limit its ruling accordingly, leaving the gender-conscious remedies of any program undisturbed. Finally, while the Women Amici strongly endorse the statutory framework at issue, this brief focuses on the constitutionality of DOT's regulations.[3]

SUMMARY OF THE ARGUMENT

Petitioner is challenging only the most recent versions of DOT programs which have yet to be applied to it. Consequently, the instant challenge is a facial one, and the statutory and regulatory provisions at issue must be upheld unless they cannot be applied constitutionally under any set of circumstances. Petitioner cannot make this showing.

At the time it enacted the challenged statutes, Congress had a strong basis in evidence for concluding that race and gender discrimination had impeded the entry of

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[3] Because only the current regulations are at issue, *Adarand Constructors, Inc. v. Mineta*, 121 S. Ct. 1598 (2001), all future citations to the applicable regulatory provisions refer to those which are set forth in the latest version of the Code of Federal Regulations unless otherwise noted. 13 C.F.R. Part 124 (2000); 48 C.F.R. Part 19 (2000); 49 C.F.R. Part 26 (2000).

minority- and women-owned firms into the transportation-related construction industry and prevented these firms from becoming competitively viable in that industry. In order to further the compelling interest of remedying this discrimination, Congress provided DOT with a broad and flexible statutory authorization to implement a number of regulatory provisions to assist minority- and women-owned businesses, including some measures which take race and gender into account. Consistent with the scope of its congressional authorization, DOT currently employs the race- and gender-conscious provisions of its affirmative action programs in only those regions of the country where there is a contemporaneous finding of discrimination within the construction industry and only to the extent necessary to remedy its effects. Because the statutory scheme is flexible enough to be implemented in a constitutional manner, it survives both strict and intermediate scrutiny.

DOT's regulations for the SDB and the DBE programs are likewise narrowly tailored to further the compelling interest of remedying race and gender discrimination. While both programs have a number of aspects that are relevant to this narrow tailoring analysis, the Court should pay particular attention to three components: (1) the process by which minorities, women and others become eligible to benefit from these programs; (2) the goals for achieving a certain level of contracting by minority- and women-owned firms; and (3) the geographic applicability of the programs. For each of these components, the statutory scheme provides DOT with sufficient flexibility to devise a narrowly tailored program to remedy discrimination that meets constitutional requirements, and, in fact, DOT has done so. DOT's regulations further narrowly tailor the remedial provisions by limiting the time period for eligibility and by allowing persons who are not presumptively eligible to benefit from these programs under some circumstances. DOT's regulations for both the SDB and DBE programs constitute a carefully crafted and

narrowly tailored effort to further the compelling interest in remedying discrimination.

Given the precise manner in which these regulations are designed to address the specific conditions of each locality where they operate, they are constitutional on their face, and there is no record of any unconstitutional implementation of any aspect of either the SDB or DBE program that is currently in effect or likely to be in effect in the future. Nor is there any evidence of any unconstitutional actions by recipients of federal grant funds under the DBE program. Thus, any claim that the new regulations will be applied in an unconstitutional manner is not ripe for review. Because DOT's regulations for both the SDB and DBE programs constitute a carefully crafted and narrowly tailored effort to further the compelling and important interests in remedying discrimination, they survive strict scrutiny.

For all of these reasons, the judgment of the Tenth Circuit Court of Appeals should be affirmed.

ARGUMENT

I. IN ORDER TO PREVAIL, PETITIONER MUST ESTABLISH THAT THE STATUTES AND REGULATIONS CANNOT BE APPLIED IN A CONSTITUTIONAL MANNER UNDER ANY SET OF CIRCUMSTANCES.

It is undisputed that DOT has discontinued the use of the particular contractual clause which initially gave rise to this lawsuit, *see* Lodging by *Amici Curiae* Women First National Legislative Committee, et al. ("Lodging") at 13 (filed concurrently), and Petitioner makes no claim of injury from any DOT program currently in effect. Consequently, Petitioner's challenge is a facial one. Thus, as in *Fullilove v. Klutznick*, 448 U.S. 489 (1980), all "doubts must be resolved in support of the...judgment" of Congress in this area, 448 U.S. at 489, and the program can only be struck down if Petitioner can "establish that no set of circumstances exist under which the Act would be valid." *See, e.g., Rust v. Sullivan*, 500 U.S. 173, 183 (1991) (noting further that the

"'fact that [the regulations] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [them] wholly invalid'") (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)) (alteration in original). By definition, this is a "heavy burden" to bear, *Salerno*, 481 U.S. at 745, which cannot be successfully carried if "the regulations are both authorized by the Act [in question] and can be construed in such a manner that they can be applied to a set of individuals without infringing upon constitutionally protected rights." *Rust*, 500 U.S. at 183. Given the facts of this case, Petitioner cannot make this showing.

II. CONGRESS AND DOT HAD A STRONG BASIS IN EVIDENCE FOR CONCLUDING THAT RACE AND GENDER DISCRIMINATION HAVE HARMED MINORITY- AND WOMEN-OWNED FIRMS IN TRANSPORTATION-RELATED GOVERNMENT CONTRACTING.

When they adopted the statutes and regulations at issue, Congress and DOT both possessed the requisite "'strong basis in evidence,'" *see City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986)), for concluding that race and gender discrimination had harmed—and was continuing to harm—minority- and women-owned firms in the construction industry.[4] As the

[4] As Representative Holmes-Norton explained during the 1998 congressional debate on the topic, there have been "at least 29 hearings on this subject between 1980 and 1995...and...an additional eleven [more] through the end of 1997...." 144 Cong. Rec. H3958 (May 22, 1998) (statement of Rep. Holmes-Norton). Indeed, few matters appear to have been more thoroughly evaluated by the national legislature. Furthermore, Congress has conducted and been presented with numerous disparity and other statistical studies, in addition to hearing countless personal testimonials, which all show that there is a serious problem of race and gender discrimination at all levels of the construction industry. *Id.* at H3958-59. The Department of Justice has summarized these extensive findings, which are far too voluminous to recount here, in the Federal Register. *See* 61 Fed. Reg. 26042, 26050-63 (May 23, 1996).

Fullilove Court found over twenty years ago, "Congress had [an] abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination" in federal contracting. 448 U.S. at 478. Unfortunately, due to the entrenched nature of discrimination in this industry, the evidentiary foundation—and overwhelming need—for congressional action has only solidified with time. *See, e.g.*, Section IV *infra*.

Congress has also found that women have been harmed by discrimination in their efforts to enter and compete in the transportation-related contracting arena. For example, women-owned firms have been excluded from contracting opportunities by the same "good old boy" network which has discriminated against minority firms. *See, e.g., ISTEA's Race Based Set Asides After Adarand: Hearing Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Comm. on the Judiciary*, 105th Cong., at 117-23 (1997) (statement of Janet Schutt); *see also* H.R. Rep. No. 100-736, at 7-27, 27-57 (1988); *New Economic Realities: The Role of Women Entrepreneurs, Hearing Before the House Comm. on Small Businesses*, 100th Cong., at 3-158 (1988). In addition, women-owned firms have historically earned only half of what comparable male-owned companies receive in this industry. *See, e.g.*, 144 Cong. Rec. S1409 (Mar. 5, 1998) (statement of Sen. Kerry); *see also id.* at S1490 (Mar. 6, 1998) (statement of Sen. Lautenberg) (noting the additional problems women-owned firms have in obtaining financing despite their "lower rate of loan delinquency"); *accord* H.R. Rep. No. 100-736, at 13-18 (same). It was for these reasons that women were designated as a presumptively disadvantaged group for purposes of the DBE program. *See* S. Rep. No. 100-4, at 11 (1987) (noting how "barriers still remain, preventing minorities and women from successfully competing in the industry"); H.R. Rep. No. 100-955, at 9-17 (1988) (discussing the historical practices of gender discrimination in the construction, lending, and bonding

industries); *see also* 134 Cong. Rec. 27816-21 (Oct. 3, 1988) (referring to the findings of H.R. Rep. No. 100-736).

While Petitioner attempts to find fault with selected studies and other limited pieces of evidence considered by Congress, *see* Pet.'s Br. at 32-33, the record supporting the congressional findings in this area is so substantial that the current challenge to only a limited number of studies cannot undermine the conclusion that Congress had a strong basis in evidence to enact the race- and gender-conscious provisions at issue. At a minimum, Congress is entitled to consider competing studies, in addition to other evidence, and come to a conclusion regarding the weight to be given to each. *See Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 199 (1997) (explaining that "[t]he Constitution gives to Congress the role of weighing conflicting evidence in the legislative process" and that, as a result, the courts "must give considerable deference...to Congress' findings and conclusions").

Moreover, DOT is entitled to rely on the evidence available to Congress as well as Congress' subsequent findings based on this evidence. DOT may also rely on the evidence which it collected when carrying out its statutory authority to implement race- and gender-conscious programs to remedy the discriminatory practices that Congress found within the construction industry. *See, e.g.*, GAO, Report to Congressional Committees: Disadvantaged Business Enterprises, Critical Information is Needed to Understand Program Impact 38-40 (June 2001) (noting the decline in minority and women contracting when Minnesota and Louisiana canceled their DBE programs). Because the body of evidence collected by Congress and DOT in this area is so overwhelming, it is clear DOT also had sufficient evidence upon which to act.

III. THE NARROW TAILORING ANALYSIS EXAMINES SEVERAL FACTORS. IT IS NOT A SINGLE, RIGID TEST.

In determining whether a race-conscious remedy is narrowly tailored to serve a compelling governmental

interest, this Court has "look[ed] to several factors, including the necessity for the relief and the efficacy of alternate remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties." *United States v. Paradise*, 480 U.S. 149, 171 (1987); *see also Adarand I*, 515 U.S. at 237-38 (also asking "whether there was 'any consideration of the use of race-neutral means to increase minority business participation' in government contracting or whether the program was appropriately limited such that it 'will not last longer than the discriminatory effects it is designed to eliminate.'") (quoting *Croson*, 488 U.S. at 507; *Fullilove*, 448 U.S. at 513).

While rigorous, this calculus does "not require[] remedial plans to be limited to the least restrictive means of implementation." *Fullilove*, 448 U.S. at 508; *see also Bush v. Vera*, 517 U.S. 952, 977 (1996) ("reject[ing], as impossibly stringent, the District Court's view of the narrow tailoring requirement, that 'a district must have the least possible amount of irregularity in shape, making allowances for traditional districting criteria'") (citation omitted); *accord Board of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469, 478 (1989) ("In requiring [a regulation] to be 'narrowly tailored'..., we have not insisted that there be no conceivable alternative, but only that the regulation not 'burden substantially more speech than is necessary to further the government's legitimate interests.'") (citations omitted). Put differently, "a plan need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently 'narrowly tailored'...." *Wygant*, 476 U.S. at 287 (O'Connor, J., concurring). Instead, as the *Bush* Court explained, the government is afforded "a limited degree of leeway" or flexibility when acting to further a compelling interest. 517 U.S. at 977. This tailoring requirement is even further relaxed when a gender-conscious program is at issue. *See, e.g., Nguyen v. INS*, 121 S. Ct. 2053, 2059 (2001) (explaining that, under intermediate

scrutiny, the measure must be substantially related to an important government interest) (relying on, *inter alia*, *United States v. Virginia*, 518 U.S. 515, 533 (1996) ("*VMI*")).

Thus, neither strict nor intermediate scrutiny is intended to be "fatal in fact" by establishing an impossibly high standard which no program could ever meet. *See Adarand I*, 515 U.S. at 237; *Fullilove*, 448 U.S. at 519 (Marshall, J., concurring); *see also VMI*, 518 U.S. at 533-34. Instead, the purpose of this analysis is to "smoke out" illegitimate uses of race or gender "by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool." *Croson*, 488 U.S. at 493; *accord VMI*, 518 U.S. at 532-36. Because Congress and DOT were pursuing such a goal, the statutes and regulations at issue are constitutional.

IV. CONGRESS ADOPTED THE CURRENT PROGRAM ONLY AFTER CONSIDERING RACE- AND GENDER-NEUTRAL ALTERNATIVES.

As Justice Powell noted in *Fullilove*, when Congress first acted "in 1977, it knew that other remedies had failed to ameliorate the effects of racial discrimination in the construction industry. Although the problem had been addressed by antidiscrimination legislation, executive action to remedy employment discrimination in the construction industry, and federal aid to minority businesses, the fact remained that minority contractors were receiving less than 1% of federal contracts." 448 U.S. at 511 (Powell, J., concurring); *see also Croson*, 488 U.S. at 507 (noting *Fullilove*'s finding that "Congress had carefully examined and rejected race-neutral alternatives before enacting the MBE set-aside").

Twenty years later, in 1998, at the time it approved DOT's continued affirmative action efforts, Congress again considered race- and gender-neutral programs and found them to be inadequate. Most notably, Congress considered the results when States dismantled their affirmative action programs and simply relied on the marketplace to determine

who received a given contract. *See, e.g.*, 144 Cong. Rec. S1401, S1404, S1426 (Mar. 5, 1998) (statements of Sens. Warner, Baucus, and Domenici). In these instances, participation by women and minorities in State contracting decreased dramatically, frequently dropping to or close to zero. *See, e.g., id.* at S1409, S1421 (statements of Sens. Kerry and Moseley-Braun). For example, less than one year after Michigan abandoned its minority contracting program, "minority-owned businesses were completely shut out of the State highway construction projects," and "the percentage of highway dollars going to [these] businesses fell to zero." *Id.* at S1409, S1404 (statements of Sens. Kerry and Baucus). However, at the same time, participation by women and minorities in contracting opportunities through DOT's affirmative action program stood at nearly 13 percent. *Id.* This disparity repeated itself across the country, indicating that minority firms which were ready, willing, and able to perform government contract work in this area were nevertheless being impermissibly shut out of these opportunities. *Id.* at S1401, S1404, S1409, S1420-21, S1426 (statements of Sens. Warner, Baucus, Kerry, Moseley-Braun, and Domenici). Based on this and the other evidence available to it, Congress could reasonably and permissibly conclude that race- and gender-neutral measures standing alone would not simply fail to cure the problem of discrimination within the construction industry but, worse, actually work to exacerbate it.

Furthermore, when Congress authorized DOT to use race- and gender-conscious programs, it was aware that DOT would first attempt to implement these programs in a race- and gender-neutral fashion, and DOT has in fact done so. *See id.* at S1403, S1409, S1425 (statement of Sens. Baucus, Kerry, and Domenici); *see also* Section VI *infra*. These are additional factors which demonstrate the narrow tailoring of the SDB and DBE programs. *Cf. Paradise*, 480 U.S. at 200-01 (O'Connor, J., dissenting) (emphasizing the need to consider "available alternative remedies").

V. THE PROCESS OF DETERMINING ELIGIBILITY FOR THE SDB AND DBE PROGRAMS IS NARROWLY TAILORED.

After considering a substantial body of evidence, Congress found that invidious race and gender discrimination had a particularly detrimental effect on certain groups within our society in regard to their ability and efforts to engage in government contracting. *See* Section II *supra*. Congress therefore determined that firms owned and controlled by "socially and economically disadvantaged" individuals should be eligible for certain benefits in the contracting process. This judgment is reflected in a statutory provision which presumes that certain groups are eligible to participate in the SDB and DBE programs administered by DOT. *See* 15 U.S.C. § 637(d)(3)(C) (covering "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration"). This presumption, as administered by DOT, provides the regulatory framework for the eligibility determinations in both the SDB and the DBE program. 48 C.F.R. § 19.001 (incorporating by reference 13 C.F.R. Part 124); 49 C.F.R. § 26.67(a). DOT has adopted a number of regulations to ensure that the presumption is carefully crafted to accomplish the goal of remedying discrimination without placing an undue burden on innocent, non-minority firms.

A. The Presumption Is Rebuttable.

The statutory scheme affords DOT considerable flexibility in determining how to apply the presumption of eligibility. Although the statute "presume[s]" that members of certain minority groups are qualified to participate in either the SDB or DBE programs, 15 U.S.C. § 637(d)(3)(C), this presumption is a rebuttable one. As Petitioner's own authority indicates, this is the plain meaning of the term. *See, e.g.*, 1 *Weinstein's Federal Evidence* § 301.02[1] (2d ed. 2000) ("[I]f a basic fact...is established, then the fact-finder must accept that the presumed fact...has also been

established, *unless the presumption is rebutted.*") (emphasis added); *accord* 2 *McCormick on Evidence* § 344 (5th ed. 1999) (adopting the common meaning of the term "presumption" which "denotes a rebuttable presumption"). It is also the meaning which Congress understood when it most recently considered the matter. *See, e.g.*, 144 Cong. Rec. H3960 (May 22, 1998) (statement of Rep. Holmes-Norton) ("The presumptions of social and economic disadvantage are...rebuttable, not absolute."); *accord id.* at S1402 (Mar. 5, 1998) (statement of Sen. Baucus) (noting that "[i]t is only a presumption, a presumption that can be overcome....").

In accordance with Congress' delegation of authority, DOT has promulgated regulations which are entirely consistent with this statutory framework. *See* 49 C.F.R. § 26.67(a) (requiring the certifying authority to "rebuttably presume" that members of certain groups are qualified to participate in the program); *see also* 13 C.F.R. § 124.103(b) (explaining that it is a "rebuttable presumption" which operates in these instances). These provisions were adopted in accordance with DOT's rule-making authority in this area, *see generally* 64 Fed. Reg. 5096 (Feb. 2, 1999), and Petitioner has made no showing that the challenged regulations are in any way "procedurally defective, arbitrary and capricious in substance or manifestly contrary to the statute." *United States v. Mead Corp.*, 121 S. Ct. 2164, 2171 (2001); *accord Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (same).

Under the current regulations, the mere process of applying for admission to the SDB and DBE programs triggers an extensive, in-depth, onsite review. *See* Sections V.B – V.D *infra*. In the process, applicants are required to present evidence that they truly qualify for the program. 49 C.F.R. § 26.67(a); 13 C.F.R. §§ 124.1002, 124.1008. The heightened administrative scrutiny paid to these applications further tailors the programs at issue. Indeed, this searching review addresses Petitioner's argument that

individuals will be approved or rejected for the programs based solely on their race or gender. *See* Pet.'s Br. at 41-45. For example, under the DBE program, a certifying authority "may, at any time, start a proceeding to determine whether [a] presumption should be regarded as rebutted" if there is a "reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially and/or economically disadvantaged." 49 C.F.R. § 26.67(b)(2). Likewise, if "there is reasonable cause to believe that a currently certified firm is ineligible," either the certifying authority or DOT may "initiate a proceeding to remove the firm's certification." 49 C.F.R. § 26.87(b)-(c). Also, "[a]ny person may file...a written complaint alleging that a currently-certified firm is ineligible and specifying the alleged reasons why...." *See id.* § 26.87(a).[5] Similarly, under the SDB program, "the contracting officer or the [Small Business Administration] may protest the disadvantaged status of a proposed subcontractor." 48 C.F.R. § 19.703(a)(2); *accord* 13 C.F.R. § 124.1008(e); *see also id.* § 124.1016(a) (allowing the Small Business Administration to reconsider an SDB's status "whenever it receives credible information calling into...question a firm's eligibility"). "Other interested parties may [also] submit information to the contracting officer or the SBA in an effort to persuade [them] to initiate a protest." 48 C.F.R. § 19.703(a)(2); *accord* 13 C.F.R. § 124.1017. These regulations ensure that only qualified firms are admitted into the SDB and DBE programs.

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[5] Pursuant to 49 C.F.R. § 26.87(f), a firm can have its certification revoked if: (1) "[c]hanges in the firm's circumstances since [its] certification...render the firm unable to meet the eligibility standards;" (2) "[i]nformation or evidence not available...at the time the firm was certified" has since come to light; (3) it is discovered that "[i]nformation... was concealed or misrepresented by the firm in previous certification actions;" (4) there is "[a] change in certification standards or requirements by the [DOT];" or (5) a "documented finding that [the] determination to certify the firm was factually erroneous." 49 C.F.R. § 26.87(f). The SDB program contains similar regulations. 13 C.F.R. § 124.1016.

B. Program Eligibility Is Limited To Persons Who Are Economically Disadvantaged.

Additionally, in order to limit benefits of the SDB and DBE programs to only those who need assistance in becoming competitively viable, DOT has imposed a financial cap on applicants to and participants in these programs. 13 C.F.R. §§ 124.1002(c), 124.1008(e)(1); 49 C.F.R. § 26.67(b). Thus, if an "an individual's personal net worth exceeds $750,000, the individual is no longer eligible for participation in the program and cannot regain eligibility by making an individual showing of disadvantage." 49 C.F.R. § 26.67(b)(4); *accord* 13 C.F.R. §§ 124.1002(c), 124.1008(e)(1). Moreover, the current DBE and SDB programs impose overall size limitations on the firms themselves, which prevents businesses that have been competitively successful from taking advantage of the program. 49 C.F.R. § 26.65 (incorporating the standards set forth in 13 C.F.R. Part 121); 13 C.F.R. § 124.1002(b) (same). While Petitioner claims that these financial caps could be lower to exclude more people from the program, *see* Pet.'s Br. at 8 n.4, this ceiling is a reasonable approach to balancing the goals of excluding financially successful firms while including firms that have some realistic chance of success in the market. As DOT explained when it promulgated its final rule, "[u]sing a figure any lower...could penalize success and make growth for DBEs difficult (since, for example, banks and insurers frequently look to the personal assets of small business owners in making lending and bonding decisions)." 64 Fed. Reg. at 5117-18.

C. The Different Treatment Resulting From The Presumption Is Limited To The Burden Of Proof Placed On Applicants Who Are All Subjected To An Individualized Inquiry.

Pursuant to 49 C.F.R. § 26.67(a)(1), any business seeking to be certified as a DBE "must...submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically

disadvantaged." In addition, "each individual owner of a firm applying to participate as a DBE...[must] submit a signed, notarized statement of personal net worth, with appropriate supporting documentation." *Id.* § 26.67(a)(2)(i). The SDB program imposes similar requirements. *See* 13 C.F.R. § 124.1008(a), (e). All of this personal and financial information must be included in an application for certification, which is then reviewed by the appropriate authority or agency in order to determine whether an applicant qualifies for the program. *See* 49 C.F.R. § 26.83(e)(2)-(3); *id.* § 26.83(c); *see also* 13 C.F.R. § 124.1008. Thus, each applicant, whether or not he or she is entitled to the presumption, is subjected to an individualized inquiry regarding social and economic disadvantage.[6]

Moreover, individuals who are not presumptively eligible to participate in the DBE and SDB programs may nevertheless still qualify for certification. 49 C.F.R. § 26.67(d); 13 C.F.R. § 124.1008(e)(2). In these instances, these firms only "ha[ve] the burden of demonstrating..., by a preponderance of the evidence, that the individuals who own and control it are socially and economically disadvantaged." 49 C.F.R. § 26.67(d); *accord* 13 C.F.R. § 1008(e)(2) (incorporating 13 C.F.R. § 124.103(c)). Thus, the only distinction between persons who qualify for the presumption and those who do not is the burden of proof placed upon them to show they have been harmed by discrimination.

This distinction is not simply an attempt to reduce the administrative burden of identifying persons who have been the victims of discrimination. Instead, it represents a

[6] As an additional incentive to provide accurate and truthful information in these submissions, any misrepresentations in the application process may result in not only a denial of certification but also the imposition of civil or criminal penalties. *See* 49 C.F.R. § 26.73(b)-(c); 13 C.F.R. § 124.1011; *see also* 15 U.S.C. § 645(d); 18 U.S.C. § 1001; 31 U.S.C. § 3729; *cf.* 61 Fed. Reg. at 26045 (advocating increased enforcement of the civil and criminal provisions of federal law which prohibit the making of false or fraudulent statements to the government).

reasonable accommodation among a number of policy goals. After considering substantial evidence, Congress concluded that discrimination in the construction industry had affected women and minorities most severely. Like Title VII's burden-shifting framework, the presumption enables members of these groups to address the particularly "elusive factual question of intentional discrimination." *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 & n.8 (1981). At the same time, program benefits are not available to women and minorities who, given their financial success, have not been adversely affected by discrimination. Basing eligibility on a rebuttable presumption of disadvantage, coupled with a limitation on personal net worth, accomplishes these goals.

Congress also gave DOT the authority to provide benefits to others who had suffered because of other forms of discrimination, such as disability or poverty, but did not presume these effects for individuals with certain characteristics. 49 C.F.R. § 26.67(d); 13 C.F.R. § 1008(e)(2). The difference in the burden of proof reflects a congressional judgment about the severity and pervasiveness of discrimination against various groups in transportation-related construction and the likely effect of this discrimination in discouraging contracting opportunities.

D. The Presumption Applies To Groups Found By Congress To Have Been Harmed By Discrimination.

Petitioner argues that the presumption is unconstitutionally over-broad because of its "'random inclusion'" of groups which "'may never have suffered from discrimination in the construction industry.'" Pet.'s Br. at 43 (citing *Croson*, 488 U.S. at 506). However, unlike the situation in *Croson* where "[t]here [wa]s *absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry," 488 U.S. at 506 (emphasis in original), Congress and DOT had a strong basis

in evidence for concluding that the groups of individuals identified in both the statute and the regulations have suffered discrimination in efforts to enter and compete in transportation-related construction. *See* Section II *supra*. DOT has carried out its responsibility to implement this presumption by promulgating reasonable regulations that identify, in the most practical and least intrusive way, persons within the groups set out in the statute. These regulations also list nationalities that correspond to the groups identified in the statute. *Compare* 15 U.S.C. § 637(d)(3)(C) *with* 13 C.F.R. § 124.103(b) *and* 49 C.F.R. § 26.67(a). Using a person's nationality in this manner is constitutionally permissible as a practical response to the difficulty that may be involved in determining an applicant's race.

VI. DOT REQUIRES THE USE OF RACE- AND GENDER-NEUTRAL ALTERNATIVES BEFORE RACE OR GENDER-CONSCIOUS REMEDIES CAN BE IMPLEMENTED.

Both the DBE and SDB programs require consideration of race- and gender-neutral means before engaging in race- or gender-conscious remedies. The DBE program requires the States to "meet the maximum feasible portion of [their] overall goal by using race-neutral means of facilitating DBE participation." 49 C.F.R. § 26.51(a). These measures include: "unbundling large contracts to make them more accessible to small businesses;" "[p]roviding technical assistance;" placing DBEs and other small contractors on mailing lists for bids; ensuring that prime contractors receive lists of all potential subcontractors; "[i]mplementing a supportive services program to develop and improve immediate and long term business management, record keeping, and financial and accounting capability;" "[e]stablishing a program to assist new, start-up firms;" and assisting small companies in "develop[ing] their capability to utilize emerging technology [to] conduct business through electronic media." *Id.* § 26.51(b)(1)-(9). In addition, the regulations set forth a number of race-neutral

remedies that are designed to address the historical discrimination practiced by the lending and bonding industries. *See id.* § 26.51(b)(2) (discussing, *inter alia*, "simplifying the bonding process" and "reducing bonding requirements"); *see also id.* § 26.29 (ensuring "prompt payment" to subcontractors).

Similarly, the SDB regulations assume "that agencies will continue such outreach and technical assistance efforts at all times, so that race-conscious measures will be used only to the minimum extent necessary to achieve legitimate objectives." 61 Fed. Reg. at 26048-49 (listing a number of potential race-neutral programs, such as a surety bond program for small contractors, continued efforts to eliminate the impact of surety costs from bids, expanded mentor-protégé programs, and the cessation of "any practices that disproportionately affect opportunities for SDBs and do not serve a valid and substantial procurement purpose"). As the Executive Branch has stated, it intends that "[t]he maximum use of such race neutral efforts will reduce to a minimum the use of race-conscious measures...." *Id.* at 26049.

Although these measures are not expressly defined as "gender-neutral," they are intended to benefit all small businesses, regardless of the race or gender of their owners.

VII. THE PROGRAMS LAST NO LONGER THAN NECESSARY.

It is undisputed that the statutory provisions Petitioner challenges will automatically expire in 2004 unless Congress determines that it is necessary to reauthorize them. *See* Transportation Equity Act for the 21st Century, Pub. L. 105-178, § 1101(a), 112 Stat. 107, 111 (1998) ("TEA-21"). Thus, as in *Fullilove*, "[i]t will be necessary for Congress to re-examine the need for a race-conscious remedy before it extends or re-enacts" the statute. 448 U.S. at 513 (Powell, J., concurring) (also noting the importance of a "temporary...remedy [which] ensures that a race-conscious program will not last longer than the discriminatory effects it was designed to eliminate"). As the

record demonstrates, both Congress and the Executive Branch have undertaken substantial reviews of the need for these programs and the appropriateness of their provisions. Indeed, as a result of this ongoing review process, the current versions of the statutes and regulations are not the same ones first challenged over twelve years ago. They have undergone significant changes, in large part to comport with constitutional requirements.

Under the current SDB and DBE regulations, a qualified business can only be certified as disadvantaged for a period of three years, 49 C.F.R. § 26.83(h); 13 C.F.R. § 124.1014(a), and these firms must demonstrate on a periodic basis that they remain qualified to participate in the program. 49 C.F.R. § 26.83(j); *see also* 13 C.F.R. § 124.1016(b) (requiring an SDB to "report within 10 days... any changes in ownership and control or any other circumstances which could adversely effect its eligibility as an SDB"). Although a business can apply to be re-certified as a DBE or SDB, it must again show that it meets all of the eligibility criteria. 49 C.F.R. § 26.83; 13 C.F.R. § 124.1014(c).

VIII. THE ASPIRATIONAL GOALS ARE NARROWLY TAILORED.

As we have argued, Petitioner has no standing to challenge the goals employed by the SDB and DBE programs to increase contracting by minority- and women-owned firms. *See* Note 2 *supra*. However, should the Court reach the matter, it is important to note that these flexible, aspirational goals have nothing in common with the "rigid racial quota" struck down in *Croson*, 488 U.S. at 499. First, they are not mandatory. 49 C.F.R. § 26.41; 48 C.F.R. § 19.705-4. They are also subject to periodic adjustment, specifically tailored to each geographical region where they apply, and have no application at all in cases where there are no demonstrated effects of discrimination. 49 C.F.R. § 26.45; 64 Fed. Reg. 52806, 52807 (Sept. 30, 1999).

DOT has implemented its SDB program in conformity with the congressional policy codified in the Small Business Act, which sets a "[g]overnment-wide goal

for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals" at "not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year." 15 U.S.C. § 644(g)(1). While this aspirational goal applies to the entire executive branch, DOT's goal is established only after the Secretary of Transportation consults with the Small Business Administration in order to ensure that the target number "realistically reflect[s] the potential of...small business concerns owned and operated by socially and economically disadvantaged individuals...to perform such contracts...and subcontracts...." *Id.* § 644(g)(2). There is no statutory or regulatory provision requiring DOT to meet this goal.

The DBE goal is derived from TEA-21, in which Congress established a 10 percent goal for the participation of minorities and women in all federally funded contracting. Pub. L. 105-178, § 1101(b)(1), 112 Stat. 107, 113 ("Except to the extent that the Secretary [of Transportation] determines otherwise, not less than 10 percent of the amounts available for any program...shall be expended with small business concerns owned and operated by socially and economically disadvantaged individuals."). This goal is also an "aspirational" one which can be adjusted upwards or downwards depending upon the circumstances. 49 C.F.R. §§ 26.41, 26.43.

In using grants funds pursuant to this program, the States are specifically instructed that they may not blindly embrace the 10 percent figure as their own goal. 49 C.F.R. §§ 26.41(b), 26.45(b). Instead, a State's "overall goal must be based on demonstrable evidence of the availability of ready, willing and able DBEs relative to all businesses [which are] ready, willing and able to participate on...DOT assisted contracts...." 49 C.F.R. § 26.45(b). "The goal must reflect [the State's] determination of the level of DBE participation [that the State] would expect absent the effects of discrimination." *Id.* DOT has provided the States with a

great deal of guidance as to how this goal should be calculated.

Each State must "determin[e] a base figure for the relative availability of DBEs," through any number of approved ways, including the use of DBE directories and census data, bidders lists, disparity studies, or any other methodology which is "based on demonstrable evidence of local market conditions and...designed to ultimately attain a goal that is rationally related to the relative availability of DBEs in [the relevant] market." 49 C.F.R. § 26.45(c)(1)-(5). DOT has provided the States with ample direction on how to use these various methods. *See, e.g.*, 49 C.F.R. § 26.45; *see also* 64 Fed. Reg. at 5109-12.

Once a State has calculated its baseline figure, it "must [then] examine all of the evidence available in [its] jurisdiction to determine what adjustment, if any, is needed ...in order to arrive at [the] overall goal." 49 C.F.R. § 26.45(d). When making this adjustment, the State should take into account a variety of factors, including "[t]he current capacity of DBEs to perform work in [the] DOT-assisted contracting program, as measured by the volume of work DBEs have performed in recent years," "[e]vidence from disparity studies...to the extent that it is not already accounted for in [the] base figure," and "evidence from related fields that affect the opportunities for DBEs to form, grow and compete," such as "[s]tatistical disparities in the ability of DBEs to get the financing, bonding and insurance required to participate in [the] program." *Id.* § 26.45(d)(1)-(2). While the States are also allowed to "make an adjustment to [their] base figure to account for the continuing effects of past discrimination...or the effects of an ongoing DBE program, th[is] adjustment must be based on demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought. *Id.* § 26.45(d)(3).

Moreover, the regulations allow the States to use contract goals to meet only that portion of their overall goal which they cannot achieve through race- and gender-neutral

means, 49 C.F.R. § 26.51(e), and provide that race- and gender-conscious contracting goals should not be used if the State can achieve all of its goal through race- and gender-neutral means. 49 C.F.R. § 26.51(d)-(f). Furthermore, a State "must reduce or eliminate the use of [its] contract goals" when it "determine[s] that [it] will exceed its overall goal" given the means already employed. *Id.* § 26.51(f)(2); *see also id.* § 26.51(f)(4) (directing the States to "reduce [their] use of contract goals proportionately" when they exceed their overall goals). In fact, when a State "meets or exceeds [its] overall goals for two consecutive years" solely through the use of race-neutral means, then the State need "not set any contract goals on any contracts in the next year." *Id.* § 26.51(f)(3). Instead, the State may simply "continue using only race-neutral means to meet [its] overall goals...." *Id.* A more narrowly tailored process is difficult to envision.

IX. THE PROVISIONS GOVERNING THE GEOGRAPHICAL SCOPE OF THE PROGRAMS ARE NARROWLY TAILORED.

Petitioner also lacks standing to challenge a large number of the contractual provisions which comprise the SDB and DBE programs. *See* Note 2 *supra*. However, should the Court reach the matter, both the SDB and the DBE programs contain regulations which limit the geographic applicability of their race-conscious measures to only those areas where there is current evidence of discrimination. *See* 61 Fed. Reg. at 26045-48; *see also* 49 C.F.R. § 26.45(b). The geographic scope of the SDB program is determined by "benchmarking," a statistical "methodology...designed to ensure that [the benefits of the SDB program] are narrowly tailored to remedy discrimination." 63 Fed. Reg. 35716, 35716 (June 30, 1998). Benchmarking "measures gaps in contracting awards to SDBs that are unrelated to size and age differences with non-SDBs." *Id.* at 35718 n.10. Furthermore, the benchmarking analysis is reviewed annually to determine if any revisions are required and readjusted every three

years, 64 Fed. Reg. at 52806, so that the Government may continually tailor the race-conscious aspects of the program to the specific needs of each region.

Benchmarking thus ensures that the provisions of the SDB program Petitioner challenges will be employed only "when annual analysis of actual experience in procurement indicates that minority contracting falls below levels that would be anticipated absent discrimination." 61 Fed. Reg. at 26049. Based on the current benchmarking analysis, none of the race-conscious aspects of the SDB program for transportation-related construction contracts are available in regions making up forty-two states, including Petitioner's state of Colorado. *See* 64 Fed. Reg. at 52807. The race-conscious aspects of the SDB program in this industry are currently limited to eight states located primarily in the Mid-South, where the Government has concluded that disadvantaged businesses are being significantly under-utilized given their overall concentration in the marketplace. *See* 63 Fed. Reg. at 35718; *see also* 64 Fed. Reg. at 52807.

Thus, Petitioner is challenging the constitutionality of provisions that have never been applied to it, which are not currently in effect in its area of operation, and which will not be applied to it in the future unless the Executive Branch concludes that minority firms are being used so far below their market capacity in the Rocky Mountain region that remedial efforts are warranted. Far from undermining the evidentiary basis for the compelling interest in remedying discrimination, as Petitioner suggests, the benchmarking studies show that DOT's efforts are narrowly tailored to regions of the country where the effects of discrimination have been demonstrated.[7]

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[7] In any event, Petitioner has introduced no evidence challenging the methodology employed by the Executive Branch in making its benchmark determinations. The issue was not presented to the District Court in 1996 since the Government had only just commissioned the program. 61 Fed. Reg. at 26045-47. Nor did Petitioner raise the issue with the Tenth Circuit, even though the first benchmarking reports were prepared long before the Court of Appeals issued its written decision. *Compare Adarand III*, 228 F.3d 1147 (Sept. 25, 2000) *with* 63 Fed. Reg. 35713 (June 30, 1998) *and* 64 Fed. Reg. 52806 (Sept. 30, 1999).

DOT regulations for the DBE program impose analogous requirements upon the recipients of federal funds, obligating them to analyze thoroughly the market conditions in their locality in order to set an aspirational goal which accurately reflects the number of "ready, willing and able DBEs" in the region. 49 C.F.R. § 26.45(b). As previously explained, these regulations limit the geographic scope of the DBE program to only those areas where there is "demonstrable evidence" of current discrimination. 49 C.F.R. § 26.45(b). The DBE regulations clearly contemplate that state and local governments will not employ race- or gender-conscious measures in their areas if there are no measurable disparities attributable to discrimination there. 49 C.F.R. §§ 26.45, 26.51.

More importantly, the geographical limitations imposed by both the SDB and DBE programs further tailor the use of the presumption of disadvantage. Specifically, the challenged regulations limit the use of race- or gender-conscious measures to only those geographical areas where there is a measurable disparity in current government contracting awards that can be attributed to discrimination. 61 Fed. Reg. at 26045-48; 49 C.F.R. § 26.45(b). By definition, it is precisely those firms which have been certified as SDBs and DBEs in these areas that will have experienced the effects of these discriminatory practices. Thus, the regulations ensure that only those firms which are currently suffering from discrimination will benefit from the race-conscious measures at issue. The only way to further narrowly tailor these programs would be by conducting an individualized inquiry into the discrimination suffered by every applicant, which is something that strict scrutiny does not require. *Cf. Wygant*, 476 U.S. at 287 (O'Connor, J., concurring) (noting that "a plan need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently 'narrowly tailored'").

X. PETITIONER HAS NOT CHALLENGED THE GENDER-BASED CLASSIFICATION IN THE STATUTES OR REGULATIONS WHICH, IN ANY EVENT, SATISFY BOTH STRICT AND INTERMEDIATE SCRUTINY.

The gender-conscious provisions in the DBE program are based on a statutory provision that was originally enacted in 1988, re-enacted in 1991, and most recently re-enacted in 1998.[8] In contrast, Petitioner has challenged select portions of the Small Business Act and related regulations which set forth race-conscious measures for remedying discriminatory practices within the construction industry. *See Adarand*, 515 U.S. at 206-08. Consequently, if this Court finds a constitutional defect in any of those statutes or regulations, it should note that "this case concerns only classifications based explicitly on race." *Adarand I*, 515 U.S. at 213. Petitioner has repeated this position throughout this litigation: on summary judgment proceedings before the District Court and on appeal before the Tenth Circuit. *See* Lodging at 6-7, 9-10. Indeed, in its amended complaint, Petitioner specifically alleges that it "cannot be certified as a DBE because of the race and nationality of its operator" and, therefore, asks for an order "permanently enjoining Defendants from discriminating in the future on the basis of race or national origin in the administration of federal highway contracts in the State of Colorado." *Id.* at 2-4.

As a result, no party presented any evidence or argument on the issue of gender-based classifications to the District Court or the Tenth Circuit. In fact, the Court of Appeals found that Petitioner "has not shown standing to challenge 'the provisions of the SCC program pertaining to women-owned business enterprises (WBE).'" *Adarand III*, 228 F.3d at 1159 (referring to its earlier opinion employing

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[8] *See* Surface Transp. and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 132 ("STURAA"); Intermodal Surface Transp. Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914 ("ISTEA"); *see also* TEA-21, Pub. L. 105-178, 112 Stat. 107 (1998).

intermediate scrutiny) (citation omitted). Petitioner has never challenged this finding in this litigation and did not even raise the issue in its petition for a writ of certiorai. Consequently, the Women Amici respectfully request that the Court limit its ruling to only the race-based measures which have been challenged in this lawsuit and decline any invitation to review the gender-conscious remedies of the DBE program.

"The standard for determining the severability of an unconstitutional provision is well established: "'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left behind is fully operative as a law.'" *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (quoting *Buckley v. Valeo*, 424 U.S. 1, 108-09 (1976)); *Champlin Ref. Co. v. Corporation Comm'n of Oklahoma*, 286 U.S. 210, 234-35 (1932); *accord Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 506 n.15 (1985) (same) (citing same).

The legislative history of the DBE program demonstrates that Congress conducted an independent analysis of gender and race discrimination within the transportation-related (including airport, highway, and transit) construction industry. For example, although the DBE program was first enacted in 1982, women were not added to the program until 1987. *See, e.g.*, H.R. Rep. No. 100-736, at 21-22; 134 Cong. Rec. 27816-21 (Oct. 3, 1988). Furthermore, in order to properly evaluate the disparity of opportunities for DBE contractors, the government separately tracks minority and women transportation-related contract awards. *See, e.g.*, TEA-21, Pub. L. 105-178, § 1101(b)(6), 112 Stat. 107, 114 (1998); 49 C.F.R. § 26.45. In fact, Congress considered different studies and evidence when evaluating the level of gender discrimination within the transportation industry. *Compare* 61 Fed. Reg. at 26051-52 n.12 *with New Economic Realities*, 100th Cong., at 3-158. Thus, it is clear that Congress was acting

independently when it enacted the gender-conscious measures of the DBE program.

However, should this Court decide to review these gender-based classifications, it should employ intermediate scrutiny. *See, e.g., Nguyen*, 121 S. Ct. at 2059 (citing *VMI*, 518 U.S. at 533). Under this test, the government must have an "exceedingly persuasive" justification for its gender-based classification. *VMI*, 518 U.S. at 533. In other words, the classification must "at least serve[] important governmental objectives" in a manner which is "substantially related to the achievement of those objectives." *Nguyen*, 121 S. Ct. at 2059 (citation and internal quotation marks omitted). By definition, this burden is less demanding than the one applied in challenges to race-conscious provisions. *See, e.g., VMI*, 518 U.S. at 573-74 (Scalia, J., dissenting).

Remedying gender discrimination within the transportation industry is an important governmental objective. *See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609, 623-24 (1984) (finding a "compelling interest" of the "highest order" in "eradicating discrimination against its female citizens" when upholding a state statute that prohibited gender discrimination in places of public accommodation). In enacting and re-enacting the gender-conscious provisions of the DBE program, Congress analyzed various disparity studies, held numerous hearings and debates on the matter, and consulted with both the public and private sectors. *See, e.g., New Economic Realities*, 100th Cong. at 3-158; H.R. Rep. No. 100-955, at 9-17; 134 Cong. Rec. 27816-21 (Oct. 3, 1988); *see also* Section II *supra*. Most notably, Congress found that women-owned firms have historically been locked out of government contracting opportunities by an existing "good old boy" network, have traditionally earned half of the contracting dollars their male counterparts receive, and have faced far greater difficulty obtaining financing. *See* H.R. Rep. No. 100-955, at 9-17; *see also* Section II *supra*. Thus, Congress and DOT had a sufficient basis in evidence for concluding

that gender-conscious relief was necessary to remedy the ongoing effects of gender discrimination in this area.

In addition, the DBE program's gender-conscious measures are "substantially related to the achievement" of their objective. The direct implementation of this assistance will remedy the "resulting economic disparity" and provide a more competitive playing field for women-owned small businesses in the transportation arena. *Cf. Califano v. Webster*, 430 U.S. 313, 318 (1977); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 728 (1982). Thus, Congress' dissimilar treatment of women in the DBE program was not an "'accidental byproduct of a traditional way of thinking about [women],' but rather was deliberately enacted to compensate for particular economic disabilities suffered by women." *See Webster*, 430 U.S. at 320 (quoting *Califano v. Goldfarb*, 430 U.S. 199, 223 (1977) (Stevens, J., concurring)).

Moreover, when enacting these provisions, Congress first considered gender-neutral alternatives. Specifically, Congress was aware that women-owned businesses—like minority firms—were still receiving a disproportionately small share of government contract awards despite prior anti-discrimination legislation and numerous programs available to all small businesses under the Small Business Act. *See, e.g.*, H.R. Rep. No. 100-736 at 9, 16-22, 31, 59-61 (noting that while women-owned firms comprised nearly one-third of all small businesses during the 1980s, they typically received less than 1 percent of all federal contracting dollars); *see also* 15 U.S.C. § 631(h) (making general findings of gender discrimination against women-owned firms). It was for these reasons that Congress established aspirational contracting goals for these firms and, ultimately, determined that women-owned business—like minority firms—should be presumed disadvantaged for the purposes of the DBE program. *See, e.g.*, 134 Cong. Rec. 27816-21; H.R. Rep. No. 100-736, at 21-22.

More importantly, when Congress most recently considered the issue, it knew that the market itself does not operate in a gender-neutral fashion and, thus, that there was

a continuing need for the DBE program *See* Section IV *supra*. In addition, the States are currently required to first implement measures which have race- and gender-neutral effects before resorting to gender-conscious relief. *See* Section VI *supra*. Finally, the goals which are set for achieving these measures are purely "aspirational." *See* Section VIII *supra*. While the States are required to make "good faith" efforts to achieve these goals, there is no penalty for failing to achieve a particular result. *Id.* Also, the gender-conscious provisions of the DBE program are subject to all of the same limitations and qualifications as the program's race-conscious provisions, which guarantee that the these remedial measures are employed only in those regions where there is demonstrable evidence of gender discrimination and, then, no longer than necessary to remedy this problem. *See* Section IX *supra*.

CONCLUSION

For reasons explained above, the Women Amici respectfully urge this Court to hold that the statutes and regulations underlying the SDB and DBE programs are constitutional. If the Court determines that one or more race-conscious provisions of these programs are invalid, the Women Amici respectfully request that the Court limit its holding expressly to those provisions.

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APPENDIX

APPENDIX

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